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GURMIT KAUR JASWANT SINGH

v.

TUNG SHIN HOSPITAL & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
ROSILAH YOP JC
[SUIT NO: S6-22-705-2004]
17 APRIL 2012

C ***EVIDENCE:*** *Adverse inference - Failure to call material witness - Whether invocable - Evidence Act 1950, s. 114(g)*

EVIDENCE: *Standard of proof - Medical negligence suit - Standard required in civil cases - Balance of probabilities*

D ***TORT:*** *Damages - Aggravated damages - Aggravated damages not pleaded by plaintiff - Whether plaintiff entitled to recover aggravated damages*

TORT: *Damages - Negligence - Medical negligence - Quantum - Loss*
E *of uterus, inability to conceive - Pain and suffering - Whether global sum of RM120,000 as general damages fair and reasonable*

TORT: *Negligence - Medical negligence - Consent for surgical procedure - Whether consent form properly explained to patient - Whether consent*
F *properly obtained*

TORT: *Negligence - Medical negligence - Doctor and patient relationship - Duty of care owed by specialist doctor - Nature and extent of duty - Whether doctor had breached duty*

G ***TORT:*** *Vicarious liability - Doctor and hospital - Special relationship between doctor and hospital - Whether hospital vicariously liable for doctor's negligence*

The plaintiff was referred from the first defendant to the second
H defendant for the removal of a cervical polyp. The polyp was removed and an ultra-sound revealed that the plaintiff's uterus was enlarged due to a uterine fibroid. The plaintiff claimed that she informed the second defendant that she planned to conceive again and that she intended to enroll in a "baby choice" programme to
I conceive a baby boy. She thus wanted the fibroid removed. On

19 September 2002, the plaintiff was admitted to the first defendant for the removal of the fibroid. On the same day she was asked to sign a "consent form" which merely had her name and identity card number filled up. She claimed that her husband was not called during the signing. Neither was she given any explanation on the contents of the form. On 30 September 2002. the follow-up appointment, she asked the second defendant when she could conceive again and was shocked to learn that the second defendant had instead performed a hysterectomy on her. The second defendant apologized to her, stating that he had performed the hysterectomy, assuming that the plaintiff no longer wanted any more children. She thus instituted a medical negligence suit against the defendants in the High Court. The second defendant however claimed that the plaintiff had complained about having heavy and painful menstruation and that he had advised her that the only treatment that would completely overcome her condition was a hysterectomy - that was to be only undertaken if she no longer intended to have any children. The second defendant claimed that the plaintiff did not at any time inform him that she intended to have more children or intended to participate in a "baby choice" programme. The plaintiff was also given a full explanation of the hysterectomy to be undertaken in the presence of the plaintiff's husband and a nurse, one Esther Chan. The second defendant claimed that the plaintiff fully understood the nature of the hysterectomy to be undertaken and its consequences, including her inability to conceive and that she had consented to the same.

Held (allowing plaintiff's action with costs):

(1) The plaintiff had been referred to the second defendant who had removed a cervical polyp from the plaintiff. The plaintiff and the second defendant clearly had a doctor and patient relationship. In this relationship, the second defendant as Consultant Gynecologist and Obstetrician owed a duty of care to the plaintiff to diagnose, advice and use diligence, care, knowledge, skill and caution in administering treatment to her. *Foo Fio Na v. Dr Soo Fook Mun & Anor* (FC) (foll). (paras 29 & 30)

(2) The standard of proof which the law imposed on the plaintiff was that required in civil cases, namely proof on a balance of probabilities. *Whitehouse v. Jordan & Anor* (foll). (para 31)

(3) The evidence clearly established that the operation conducted on 19 September 2002 was to remove a fibroid, but instead the second defendant had removed the plaintiff's uterus. The fact that the second defendant had apologized to the plaintiff proved that he had admitted to a mistake he had carried out. The plaintiff's surprise that her uterus was removed showed that she did not understand the nature of the operation being performed on her. It was the duty of the second defendant to ensure that the plaintiff fully comprehend the nature of the surgery before it was done on her. It was not enough for the second defendant to proceed with the surgery just because the plaintiff had signed the consent form. (paras 34-40)

(4) It was clear from the evidence that the second defendant's diagnosis was wrong and that the plaintiff was not suffering from heavy and painful menstruation. (paras 50-52)

(5) The evidence established that the defendants had at no time informed the plaintiff of the effects of the operation. There was inadequate counseling of the plaintiff regarding the type of surgery to be carried out on her. The second defendant had also failed to advise the plaintiff on the treatment options available to her. He had given her a wrong diagnosis and subjected her to an unnecessary operation involving risk and the removal of her uterus. (paras 61, 62 & 64)

(6) The consent from the plaintiff's husband should have been obtained for the hysterectomy since there was no possibility of the plaintiff getting pregnant after such surgery. The second defendant had failed to advise the plaintiff properly in relation to the consent form and had, very unethically, asked her to sign a consent form only with her name and identity card number filled in. (paras 61-68)

(7) Nurse Esther Chan was an important witness and the failure to call her caused a gap in the defendants' case as far as consent was concerned. The court would therefore invoke

the adverse inference under s. 114(g) of the Evidence Act 1950 against the defendants, *ie*, if she was called to give evidence, her evidence would not be favourable to the defendants. The consent form was thus not completely filled up at the material time. Based on the evidence, it was clear that the plaintiff did ask for an operation but it was for a laparoscopic myomectomy (removal of uterine fibroid). She consented for such a surgical procedure and not for a hysterectomy. (paras 75-77)

(8) The second defendant was negligent and in breach of his duty of care owed to the plaintiff. The second defendant, in his treatment of the plaintiff, had not acted in accordance with the standard of care expected of the second defendant. The plaintiff had suffered injuries and losses and was entitled to damages. (para 81)

(9) No evidence was adduced to say that the second defendant was allowed to practice as an independent and freelance Consultant Obstetrician and Gynecologist on a non-exclusive basis at the first defendant hospital. There was a special relationship between the second defendant and the first defendant that caused the first defendant to be vicariously liable for the second defendant's wrongdoing. Thus, the first defendant was vicariously liable for the actions of the second defendant. (paras 89-95)

(10) The court would not award exemplary damages as aggravated damages were not pleaded by the plaintiff in her pleadings. A global sum of RM120,000 as general damages for the loss of uterus, inability to conceive, injury, pain due to the operation and pain and suffering was fair and reasonable, having regard to the seriousness of the defendants' negligent act. (paras 101-109)

Case(s) referred to:

Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd [1992] 2 CLJ 1185; [1992] 2 CLJ (Rep) 121 HC ***(refd)***

Development & Commercial Bank Bhd v. Abdullah Ismail & Anor [1989] 1 CLJ 190; [1989] 1 CLJ (Rep) 467 HC ***(refd)***

Foo Fio Na v. Dr Soo Fook Mun & Anor [2007] 1 CLJ 229 FC ***(refd)***

Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***

A *Leng Yang Sua & Anor v. Ng Yen Kee & Anor [1986] 1 CLJ 338; [1986] CLJ (Rep) 448 HC* ***(refd)***
Mathavan Shunmugam v. Woo Bee Leng [1995] 2 CLJ 957 HC ***(refd)***
Roe v. Minister of Health [1954] 2 QB 66 ***(refd)***
Rosita Baharom (an infant suing by her father and next friend Baharom Ismail) & Anor v. Sabedin Salleh [1993] 2 CLJ 300 SC ***(refd)***
B *Tan Eng Siew & Anor v. Dr Jagjit Singh Sidhu & Anor [2006] 5 CLJ 175 HC* ***(refd)***
Whitehouse v. Jordan & Anor [1980] 1 All ER 650 ***(refd)***

Legislation referred to:
C Evidence Act 1950, s. 114(g)

Other source(s) referred to:
Macgregor, *Damages,* 14th edn, p 1012, para 1498

For the plaintiff - Karminder Kaur; M/s Zainudin Wan Nadzim Chua & Mazlinda
D *For the 1st defendant - Arjeet Singh; M/s Lawrence Pereira & Partners*
For the 2nd defendant - Maidzuara Mohammed; M/s Raja, Darryl & Loh

Reported by Andrew Christopher Simon

E

JUDGMENT

Rosilah Yop JC:

F **The Claim**

[1] The plaintiff claims against the first and second defendants are based on medical negligence for damages suffered by the plaintiff as a result of the breach of duty of care by the first and second defendants towards the plaintiff.
G

Plaintiff's Case

[2] Dr Muthukumaran from the first defendant has referred the plaintiff to the second defendant also from the first defendant for
H the removal of a polyp.

[3] On 30 April 2002, the polyp was removed and a pre-vaginal test was conducted by the second defendant. The plaintiff was informed that her uterus was enlarged.

I

[4] An ultra sound was done and the plaintiff was informed by the second defendant that she has an enlarged uterus due to fibroid.

[5] The plaintiff informed the second defendant that she planned to conceive again. The fibroid will not cause her any problem unless the plaintiff intends to conceive. The plaintiff wanted to go for an operation to remove the fibroid because she was planning to go for a baby choice.

[6] On 19 September 2002, the plaintiff was admitted to the first defendant to remove the fibroid. The plaintiff saw the first defendant on the same day before the operation to sign a consent form. She was asked to sign a consent form. Only her name and her identity card number was filled up. The plaintiff's husband was not called during the signing of the form. The plaintiff was not given an explanation about the contents of the consent form. The plaintiff went through the operation and the operation was done by the second defendant. The plaintiff was discharged on 22 September 2002.

[7] On the 30 September 2002, the plaintiff went for the follow up and she met the second defendant. She asked the second defendant as to when she can conceive. The second defendant had apologized to her because the second defendant had performed hysterectomy assuming that she doesn't want any more children.

[8] The plaintiff was shocked when she heard that her uterus was removed. The plaintiff met the second defendant again on 1 October 2002 and requested for her medical records and video recording of the operation. The second defendant refused to give the plaintiff her medical records and video recording. But upon the request by her solicitor, the plaintiff was given her medical records and faulty tape recordings of the operation.

Defendants' Case

[9] It was agreed that the first defendant is a hospital registered under a Medical Act and has an address for service at No. 102, Jalan Pudu, 55100 Kuala Lumpur. It was further agreed that the second defendant is a doctor who has a practice at the first defendant hospital.

[10] The plaintiff was first referred to the second defendant by Dr Muthukumaran from the first defendant for treatment of a cervical polyp. On 30 April 2002 the plaintiff consulted the second defendant and the polyp was removed from her.

[11] The plaintiff complaints that she had been having heavy and painful menstrual periods for the past three years. The second defendant examined the plaintiff and conducted a pelvic ultrasound. The plaintiff was told that she had an enlarged uterus and may have a fibroid in her uterus. The plaintiff was informed that even if there was a fibroid the mere removal of the fibroid would not cure her menstrual problem.

[12] Various options of treatment were discussed with the plaintiff. The plaintiff was also advised by the second defendant that the only treatment that would completely overcome the menstrual problem is to undergo a hysterectomy and this is obviously only to be undertaken if the plaintiff no longer intends to have any more children.

[13] At the material time the plaintiff was 38 years of age and had four children.

[14] The plaintiff did not at anytime inform the second defendant that she intended to have more children.

[15] The plaintiff was advised to consider the options that had been discussed for the treatment of her persistent, heavy and painful menstrual periods and also to discuss these options with her husband. Accordingly the plaintiff was told to return for a follow-up consultation in two weeks time.

[16] The plaintiff telephoned the second defendant sometime in mid-September 2002 and informed the second defendant that she was still having heavy and painful menstrual periods and would like to have her condition treated as soon as possible. The second defendant advised the plaintiff to undergo a hysterectomy in order to ensure that her menstrual condition would be completely eradicated.

[17] The second defendant advised that a laparoscopic hysterectomy would be more appropriate. The plaintiff was advised that this was however subject to the availability of hospital's facilities.

[18] At no time did the plaintiff mention that the plaintiff intended to have more children or intended to participate in any 'Baby Choice' programme.

[19] The plaintiff was admitted into the first defendant hospital on 19 September 2002. The guarantee letter was presented by the plaintiff for the purposes of the hysterectomy.

[20] A full explanation of the hysterectomy to be undertaken was provided to the plaintiff in the presence of the plaintiff's husband and a nurse, one Ms Esther Chan.

[21] After explaining how the hysterectomy would be undertaken, the plaintiff and her husband were handed a consent form for the same with the plaintiff's name and address entered.

[22] The plaintiff then signed the consent form in the presence of the said nurse.

[23] The plaintiff fully understood the nature of the operation to be undertaken that is to say the hysterectomy and its consequences including her inability to conceive and had consented to the same.

[24] The hysterectomy was undertaken on 20 September 2002 and was successful.

[25] The second defendant was allowed by the first defendant to run his practice at the first defendant hospital.

Issues

[26] The agreed issues to be tried are evinced in encl. F and G.

[27] Enclosure F is the first defendant's issue to be tried. The issues are as follows:

(i) In the event the second defendant is held liable to the plaintiff, would the first defendant be held jointly vicariously liable?

[28] Enclosure G is the issues to be tried between the plaintiff and the second defendant. The issues are as follows:

(i) Whether in the circumstances of this case the second defendant had, in his treatment of the plaintiff, acted in accordance with the standard of care expected of the second defendant.

(ii) Whether the injuries suffered by the plaintiff can be said in law to have been caused or materially contributed by the second defendant in breach of his duty of care owed to the plaintiff.

(iii) Whether in the circumstances of this case, the plaintiff is entitled to the damages, interests and costs as pleaded in the statement of claim.

Analysis Of Evidence And Issues Arising Duty Of Care

[29] It was agreed that the second defendant is a doctor who has a practice at the first defendant hospital. There is no dispute that the plaintiff and the second defendant had a doctor-patient relationship. Indeed, the duty of care owned by a doctor arises out of his relationship with his patient. Without this doctor patient relationship, there is no duty on the doctor to diagnose advice and treat his patient. With the special skill and knowledge, the doctor owes a duty to the patient to use his skill, knowledge, diligence and care in administering the treatment, see the Federal Court case, *Foo Fio Na v. Dr. Soo Fook Mun & Anor* [2007] 1 CLJ 229; [2007] 1 MLJ 593 at 601.

[30] In the instant case, it is undisputed that the plaintiff was referred by Dr Muthukumaran to the second defendant for a treatment of a cervical polyp. The second defendant had removed a cervical polyp from the plaintiff. The relationship of doctor and patient is clear and undisputed and by this relationship, the second defendant as a Consultant Gynecologist and Obstetrician would owe a duty of care to the plaintiff to diagnose, advice and use diligence, care, knowledge, skill and caution in administering treatment on the plaintiff.

[31] The standard of proof which the law imposed on the plaintiff was that required in civil cases, namely proof on a balance of probabilities. In *Whitehouse v. Jordan & Anor* [1980] 1 All ER 650 it was said that:

> Allegations of negligence against medical practitioners should be considered serious and the standard of proof is, therefore a high degree of probability.

[32] I will deal with all the agreed issues to be tried together. The question arose, whether the second defendant has breached his duty of care towards the plaintiff.

[33] The following factors should be considered by the court to determine whether the defendants are negligent against the plaintiff or otherwise.

(i) Whether the second defendant had diagnosed the plaintiff that she had uterine fibroid but hysterectomy was done on her.

[34] Dr Muthukumaran who referred the plaintiff to the second defendant stated in his note at bundle B at p. 21 as follows, "uterine fibroid" - cervical polyp removed".

[35] In the guarantee letter of the plaintiff used for the admission of the operation on the 19 September 2002 (in bundle B at p. 52), also stated uterine fibroid.

[36] The second defendant carried out an operation on 30 April 2002 to remove the polyp. Polyp was removed.

[37] The second defendant did an ultra sound on the plaintiff and she was informed that there was fibroid in her uterus. According to the second defendant, the finding was uterine fibroid. The second defendant had diagnosed the plaintiff that she had uterine fibroid.

[38] The plaintiff requested the second defendant for the operation to remove the fibroid. The operation was conducted on the plaintiff to remove the fibroid but the second defendant had removed the plaintiff's uterus. The operation was done on 19 September 2002.

[39] There is clear evidence from the plaintiff, after the operation, on 30 September 2002 she went for a follow up. The plaintiff asked the second defendant as to how long it would take for her to be able to conceive. The second defendant informed her that he assumed that she did not want to have any more kids. He had removed her uterus. Upon seeing the plaintiff in a state of shock the second defendant had apologized to her because he has done hysterectomy on her. The plaintiff evidence was not challenged by the second defendant on this point. My view, when the second defendant had apologized to the plaintiff, proves that the second defendant had admitted to a mistake he had done.

[40] The plaintiff was surprised that her uterus was removed shows that she did not understand the nature of the operation being performed on her. It is the duty of the second defendant to ensure that the plaintiff fully comprehends the nature of the surgery before the operation was done on her. It is not enough for the second defendant to proceed with the surgery just because the plaintiff signed the consent form.

[41] The plaintiff was admitted for the operation to remove the fibroid but her uterus was removed by the second defendant. The second defendant admitted that he had removed the plaintiff's uterus.

(ii) Whether the plaintiff is suffering from heavy and painful menstrual problem.

[42] The second defendant pleaded that the plaintiff suffered from heavy and painful menstrual periods, also known as menorrhagia and dysmenorrhea. It is the second defendant case that the hysterectomy was medically indicated to treat the plaintiff's heavy and painful menstrual periods.

[43] According to the second defendant, the finding was uterine fibroid but the second defendant noted in his records on 19 September 2002 that the plaintiff complained of heavy and painful menstruation. The second defendant further stated that fibroid may not be the cause of painful and heavy menstruation.

[44] The question arises here, why did the second defendant diagnose the plaintiff as having uterine fibroid when it may not be the cause of the so called heavy and painful menstruation.

[45] The entry of the second defendant notes were questionable as the time frame the plaintiff complained of was stated differently, that can be shown as follows:

(i) Bundle B at p. 14 (30 April 2002) - stated problem with period for sometimes.

(ii) Bundle B at p. 20 (30 April 2002) - that plaintiff had three years history of heavy period.

(iii) Bundle B at p. 86 - letter from the second defendant to the defendant's expert witness stated "she also complained of very heavy and painful periods for many months".

[46] It is very clear here that there are three separate notations with three different time frames stated in relation to the plaintiff's complaint.

[47] This contradicts with the notation made by Dr Muthukumaran as stated in bundle B at p. 21 as follows: uterus fibroid, cervical polyp removed.

[48] No where did Dr Muthukumaran note that the plaintiff was suffering or complaining from any heavy and painful menstruation.

[49] Further, it was established that from a letter from Pejabat Kesihatan, Port Dickson (bundle B at p. 85), there was not even a slightest complain of heavy and painful menstruation from 1998 to 2003.

[50] The plaintiff was firstly diagnosed with uterine fibroid and further the second defendant notes on the so called heavy and painful menstruation. The plaintiff's suffering from heavy and painful menstruation is also doubtful. The second defendant never followed the Menorrhagia Guidelines to treat the plaintiff if the plaintiff was said to be suffering from heavy and painful menstruation.

[51] From the evidence adduced, I found that there was inadequate evaluation and treatment for menorrhagia given to the plaintiff by the second defendant. The second defendant had decided upon surgical management of menorrhagia prematurely before adequate medical treatment.

[52] It is clear from the evidence that the diagnosis was wrong and the plaintiff was not suffering from heavy and painful menstruation (menorrhagia and dysmenorrhea).

(iii) Whether the second defendant failed to advice the plaintiff on the treatment options available to her.

[53] According to both the plaintiff's and defendant's experts that there are medical options available and only if all other options failed, surgery will be the last option offered to the plaintiff which on the present facts was never done.

[54] The second defendant had done hysterectomy on the plaintiff when he knew or ought to have known that such procedure was not asked by the plaintiff and was further unnecessary.

[55] The second defendant notes on 19 February 2002 (bundle B at p. 22) showed that the plaintiff had phoned him and said she wanted a surgery. The second defendant called her back and said hysterectomy was scheduled on 18 September 2002. After careful analysis of this notes, I found that the said notes are doubtful. Hysterectomy was never mentioned to the plaintiff before. There was no mention in the notes of what type of surgery was requested by the plaintiff.

[56] This was the first time the issue of hysterectomy arose. According to the second defendant's evidence, he informed the plaintiff that the said hysterectomy was scheduled on 18 September 2002.

[57] The plaintiff had no knowledge of this. It was not discussed with the plaintiff before. The plaintiff got the impression that the surgery was for the removal of fibroid.

[58] There are extensive notes about the clinic visit by the plaintiff on 19 September 2002. The second defendant stated the following in his notes, "did not mention that she wanted only myomectomy and conservation of the uterus. Did not indicate that she wanted to have another child." It is unlikely that the second defendant would have written this without knowledge of the subsequent unhappiness of the plaintiff on 30 September 2002 when she went for the follow up and met with the second defendant. I am of the opinion that these entries are retrospective in nature.

[59] According to both the experts (SP1 and SD2), hysterectomy will be offered only if the plaintiff has completed her family. Nowhere in the second defendant notes, stated that the plaintiff had completed her family for this option be given to her.

[60] Having regards to the above, hysterectomy is not the only one of the many options that can be offered to the plaintiff.

[61] As such, based on the above the second defendant had given a wrong diagnosis to the plaintiff and had further subjected the plaintiff to undergo an unnecessary operation involving risk and removing of her uterus.

[62] From the evidence tendered, it was established that the defendants had at no time informed the plaintiff of the effects of the operation. There was inadequate counseling of the plaintiff regarding the type of surgery to be carried out on her. The second defendant failed to advise the plaintiff on the treatment options available to her.

(iv) Consent form.

[63] It was admitted by the defendants that the plaintiff only signed the consent form which only contains her name and her NRIC No. in the presence of a nurse by the name of Esther Chan.

[64] It was not a completed consent form. Nowhere in the second defendants notes that stated that the plaintiff was given an explanation about the contents of the consent form.

[65] After I had scrutinized the consent form, I am of the opinion that the consent from the husband should be obtained especially for this alleged type of operation (ie, to remove the uterus of the plaintiff as there was no possibility of getting pregnant after the removal of the uterus).

[66] It is further noted that the consent form stated as follows:

Agreement By Husband/Wife
(For operations that may result in sterility)

> I ... of ... the husband/wife of ..., the above named patient hereby agree to the operation/procedure of ... being carried out on my husband/wife, the nature and purpose of which have been explained to me by Dr/Mr and I have fully understood the same.

Date ... Witness

(Signed) ...

(Husband/Wife)

I confirm that I have explained to the patient's husband/wife the nature and purpose of this operation/procedure.

Date ...

(Signed) .

(Consultant/Medical Officer)

This Form Should Be Used In Certain Major Gynaelogical Operations Eg, Hysterectomy And Oophorectomy If The Patient Is Married And Living With Her Husband

[67] This is a major gynaecological operation which is very important for a married couple.

[68] The second defendant failed to advise the plaintiff properly in relation to the consent form (bundle B at p. 90) and asked the plaintiff to sign the consent form only with the name and NRIC No. of the plaintiff. As a medical practitioner, I conclude that this is very unethical.

[69] Furthermore, both the expert witness of the plaintiff and defendant had admitted that this consent form should have been signed by the husband which was not done here. The second defendant in his evidence could not give any reason for not having the plaintiff's husband signature taken. The first defendant witness also in her cross-examination admitted that the content of the form has to be filled up in full before the operation and has to be explained to her husband.

[70] The plaintiff's husband (PW3) evidence, established that he was present at the premises of the first defendant but was never called in. As such the second defendant entry in the consent form is very doubtful. The evidence of the second defendant stated that PW3 was present when the content of the consent form was explained to the plaintiff. This is contrary to the evidence of the plaintiff and PW3.

[71] The entry in the consent form is doubtful. If it is true PW3 was present, why is it that the signature of PW3 was not obtained since the operation is a major operation that will affect the family life of the plaintiff and her husband. They were trying to get a baby boy in the family. This was supported by the evidence of PW4.

[72] There are three different handwritings on the said consent form which were admitted by the defendants and this makes the consent form very doubtful.

[73] The second defendant failed to call the nurse by the name of Easther Chan who witnessed to the signing and explaining of the consent form to the plaintiff and her husband (as alleged by the second defendant).

[74] In *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1 Siti Norma Yaakob JCA (as she then was) said:

> He who alleges must prove such allegations and the onus is on the appellant to do so. See section 103 of EA. Thus, it is incumbent upon the appellant to produce ... his witnesses to prove the allegation. The fact that the appellant was unable to secure the attendance of ... a witness does not shift the burden to ... produce the witness ... There is no obligation in law for the respondent to produce the witness as the obligation rests with ... the party who alleges, and the fact that the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under section 114(g) is invoked against the appellant.

[75] Esther Chan is an important witness since there was a dispute about the contents of the consent form which was not filled up completely at that material time.

[76] This witness is crucial to the defendants' case. As for Esther Chan, I need to understand who filled up the form, how and why the form was not properly executed. With the failure to call Esther Chan this court was denied the opportunity of hearing evidence that would help the court to have a better picture of the whole case. Without the evidence of Esther Chan, there is a gap in the defendants' case as far as the consent is concerned. It is

for this failure also, I invoke adverse inference under s. 114(g) of the Evidence Act 1950 against the defendants. By this it means if Esther Chan is called to give evidence, her evidence will not be favorable to the defendants.

[77] Therefore, I found that the consent form was not completely filled up at that material time. Based on the evidence, it is clear that the plaintiff did ask for an operation but it was for laparoscopic myomectomy and consented for this operation and not hysterectomy.

[78] The second defendant did submit that the plaintiff had consented to the laparoscopic assisted vaginal hysterectomy that was performed by the second defendant on the plaintiff on 20 September 2002.

[79] Based on the reasons above the court did not agree with the second defendant submission that the plaintiff had consented to the laparoscopic assisted vaginal hysterectomy. The plaintiff consented to an operation to remove the fibroid only.

[80] The first defendant in this action failed to provide proper recording facilities for the operation. It was admitted by the defendants that the video recording was faulty.

[81] The court on the totality of the evidence and after evaluating it, finds that the second defendant was negligent and in breach of his duty of care owed to the plaintiff. In the circumstances, the second defendant had, in his treatment of the plaintiff not acted in accordance with the standard of care expected of the second defendant. The plaintiff had suffered injuries and losses. Therefore the plaintiff is entitled to the damages.

(v) Whether there was any vicarious liability between the first defendant and the second defendant.

[82] The principle of law with regard to the vicarious liability of a hospital for the acts or omissions of doctors practicing at the hospital was summed up by Lord Denning in *Roe v. Minister of Health* [1954] 2 QB 66 where he said:

> The hospital authorities are responsible for the whole of their staff, not only for the nurses and doctors but also for anesthetists and surgeons. It does not matter whether they are permanent or

> temporary, resident or visiting, whole time or part time. The hospital authorities are responsible for all of them. The reason is because even if they are not servants, they are agents of the hospital to give treatment. The only exception is the case of consultants or anesthetists selected and employed by the patient himself.

[83] The first defendant's defence was that at all material times the second defendant was practicing as an independent consultant Obstetrician and Gynecologist at the first defendant hospital. On the issue whether the first defendant is vicariously liable for the action of the second defendant, the first defendant relies on the case *Tan Eng Siew & Anor v. Dr Jagjit Singh Sidhu & Anor* [2006] 5 CLJ 175.

[84] In that case the second plaintiff's action against Universiti Malaya Hospital was dismissed on the ground that it was not established that the hospital had control over the first defendant, Dr Jagjit Singh Sidhu to create a form of special relationship that can cause the second defendant to be vicariously liable for the wrong doing of Dr Jagjit Singh Sidhu. Reliance was placed on the following passage in the judgment which I shall reproduce in full in order to put the issue in context:

> The first defendant was, at the material time a consultant with clients of his own. Though he was attached to the second defendant, it was only an arrangement to use the second defendant's facilities such as running his clinic there, and using its operating facilities. For this, the first defendant had to pay and the form of payment was a percentage of the first defendant's charges to his clients. These clients were exclusively that of the first defendant who had full control in the form of treatment, management, and care to be administered upon them as well as the amount of fees to be charged.
>
> Though there is no denial that when the second plaintiff was first admitted to the second defendant's hospital for treatment, and the second defendant had proposed the first defendant, but this does not mean that the second defendant had control over the first defendant. To me, this exercise was only a recommendation by the second defendant to the second plaintiff to take on the services of the first defendant. The second plaintiff could reject or refuse this recommendation of the second defendant. And similarly, the same option was opened to the first defendant. And when both the second plaintiff and the first defendant agreed to accept each

other, they entered into an independent contract with each other. The second defendant had absolutely no control over the terms and conditions of this contract relating to either type of services to be provided or regarding the terms of payment for it.

[85] It was submitted by the first defendant that the second defendant was a freelance consultant who used the first defendant premises.

[86] The first defendant was not part of the decision making process of the second defendant. The second defendant had full control in the form of treatment, management and care to be administrated on the plaintiff. The second defendant was attached to the first defendant; it was only an arrangement to use the first defendant's facilities.

[87] DW3 in her evidence states that there was a written agreement between the first defendant and Sienna Enterprise Sdn Bhd (belongs to the second defendant) which states that the second defendant was allowed to practice an in Independent and Freelance Consultant Obstetrician and Gynecologist on a non exclusive basis at the first defendant hospital.

[88] Counsel from the plaintiff replied that there was a special relationship between the first and second defendants, where:

(a) the plaintiff was referred to the second defendant by Dr Muthukumaran also from the first defendant,

(b) all payments were made to Tung Shin Hospital (first defendant) and not to the second defendant,

(c) the consent form used by the second defendant is the consent form of the first defendant,

(d) the first and second defendants had control as to the plaintiff and not the second defendant alone,

(e) the second defendant is the agent of the hospital (second defendant) to give treatment,

(f) the plaintiff submitted that the second defendant is not an independent Freelance Consultant at the first defendant.

[89] Having regards to the totality of the evidence, I found that there was no evidence adduced to say that the second defendant was allowed to practice as an Independent and Freelance Consultant Obstetrician and Gynecologist on a non exclusive basis at the first defendant hospital.

[90] This agreement was not produced in court. There is no evidence before the court save and except for the uncorroborated, self-serving evidence of DW3 that there was a written agreement between the first defendant and Sienna Enterprise Sdn Bhd. DW3 is the Executive Secretary of the first defendant. There was no evidence with regards the terms and conditions of the agreement for the court to give any consideration.

[91] This agreement is very important for the court to know about the relationship or the contract between the first defendant and the second defendant.

[92] In this regard, it is trite that the best available evidence must be tendered to assist the court to arrive at a just and fair decision. There was no explanation given by DW3 as to why the said written agreement was not produced, which pursuant to s. 114(g), Evidence Act 1950, permits the court to invoke an adverse inference. In this regard, I am of the view that the first defendant's failure to produce this written agreement tantamounts to the withholding of evidence which allows the court to infer and conclude that had the written agreement been produced, the evidence would have been unfavorable to the first defendant. I find that the first defendant had failed to prove that there was a written agreement.

[93] Having regard to the evidence I am satisfied that it was proven that there was no written agreement between the first defendant and Sienna Enterprise Sdn Bhd which states that the second defendant was allowed to practice independently at the first defendant hospital.

[94] There was a special relationship between the second defendant and the first defendant as submitted by the plaintiff counsel. From this special relationship and the failure on the part of the defendants to produce the said agreement, I am of the opinion that, that creates a form of special relationship that caused the first defendant to be vicariously liable for the wrong doing of the second defendant.

[95] In totality, I agree with the submission from the plaintiff's counsel. As such the first defendant is vicariously liable for the actions of the second defendant.

Damages

[96] Special damages are pleaded in para. 15 of the statement of claim:

(a) Medical expenses	:	RM6,430.45
(b) Police report	:	RM2
(c) Medical report	:	RM1,500
(d) Transportation cost from Port Dickson to Kuala Lumpur (RM200 x 6)	:	RM1,200
(e) Medication and treatment cost	:	RM500
(f) Other expenses	:	RM500

[97] In special damages claims the exact loss must be pleaded where the precise amount of item of damages had become clear before the trial either because it has already occurred and so become crystallized or because it can be measured with complete accuracy, see Macgregor on *Damages* 14th edn p. 1012 para. 1498.

[98] It is settled law that it is not enough for the plaintiff to itemize those claims, it must be proved. Shankar J (as he then was) in *Leng Yang Sua & Anor v. Ng Yen Kee & Anor* [1986] 1 CLJ 338; [1986] CLJ (Rep) 448 was of the view that special damages must be strictly proved.

[99] There was no evidence adduced by the plaintiff to establish the claim in item (a), (c) to (f). As such, the plaintiff fails to prove her claim for these items.

[100] As for the claim from the police report in item (b), the plaintiff has established her claim by a receipt no: 07466 (bundle B at p. 84). Item (b) is allowed as claimed by the plaintiff.

[101] The plaintiff submitted that the aggravated damages should be awarded to the plaintiff. In respect of exemplary damages I would not make any award on it because the "aggravated damages" was not pleaded by the plaintiff in her pleading. It is trite law that the parties are bound by their pleadings: *Development & Commercial Bank Bhd v. Abdullah Ismail & Anor* [1989] 1 CLJ 190; [1989] 1 CLJ (Rep) 467, *Mathavan Shunmugam v. Woo Bee Leng* [1995] 2 CLJ 957, *Rosita Baharom (an infant suing by her father and next friend Baharom Ismail) & Anor v. Sabedin Salleh* [1993] 2 CLJ 300, *Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd* [1992] 2 CLJ 1185; [1992] 2 CLJ (Rep) 121.

General Damages

[102] As stated at prayer (b), the plaintiff is claiming for assault and battery, loss of uterus, inability to conceive, injury, and pain caused due to the operation and pain and suffering after the operation.

[103] In the Guidelines for Awards in personal injury claims, the court may award RM50,000 to RM80, 000.00 for amputation of penis.

[104] For loss of an ovary, the compensation was awarded between RM15,000 to RM40,000.

[105] Loss of both ovaries the awards was between RM30,000 to RM60,000.

[106] The defendants submitted the general damages for pain and suffering and loss of amenities should not exceed RM30,000.

[107] In the instant case, the plaintiff claims for loss of uterus, inability to conceive, injury, and pain caused due to the operation and pain and suffering after the operation.

[108] The plaintiff was 38 years old at the material time. They were trying to get a baby boy and they intended to go for a baby choice program. The plaintiff and her husband are Sikh so it is important for them to get a baby boy in order to carry their family name in the Sikh community. Due to the negligence of the second defendant, the plaintiff is unable to conceive anymore. This will bring a stigma to the plaintiff's family.

[109] In all the circumstances of the case, I am of the considered view that a global sum of RM120,000 for the general damages for the loss of uterus, inability to conceive, injury, and pain caused due to the operation and pain and suffering after the operation is fair and reasonable, having regard to the seriousness of the negligent act by the defendants.

[110] Interest on general damages at the rate of 8% per annum from the date of service of the writ until full payment.

[111] Interest for special damages at 4% per annum from date of incident up to the date of judgment and at 8% per annum thereafter until full payment.

[112] Costs of this action to the plaintiff, to be taxed unless agreed.